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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1618

JOSEPH CURRAN, SHANNON WALL, WILLIAM PERRY, MARTIN E. SEGAL, ABRAHAM E. FREEDMAN and LEON KARCHMER,

Petitioners,

v.

JAMES MORRISSEY, JOSEPH PADILLA, RALPH IBRAHIM, individually and on behalf of the members of the National Maritime Union of America,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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Statement

The respondents, James M. Morrissey, Joseph Padilla nd Ralph Ibrahim, individually and in their representa- ive capacity, respectfully pray that this Court shall deny he petition of Joseph Curran, Shannon Wall, William 'erry and Abraham E. Freedman heretofore filed herein o review the interlocutory judgment of the United States 'ourt of Appeals for the Second Circuit entered on March 1, 1970, in the above-entitled matter.

Outline of Previous Proceedings

In May of 1968 the respondents, who are members of the NMU, in good standing, became aware that a certain favored few employees of the union were being included in the NMU Officers' Pension Plan though they were not elected officers as defined in the NMU Constitution. On May 17, 1968, one of the respondents, James M. Morrissey, made demand on the union, its officers and governing body for an accounting and restoration of all damages for losses, liabilities, expenses and expenditures suffered by the National Maritime Union of America by reason of the purported coverage of non-officers in the NMU Officers' Pension Plan. No response was made to this demand.

On February 4, 1969, the respondents secured an order granting leave to institute this action. Petitioners Curran, Wall and Perry moved to dismiss the complaint under Rule 12(b)(5) F. R. Civ. P., or in the alternative for summary judgment under Rule 56. The respondents filed a cross motion for summary judgment against all defendants. On May 23, 1969, the District Court for the Southern District of New York denied petitioners' motion and granted respondents' cross motion (302 F. Supp. 32). It directed that the defendants account for and repay the union all pension funds paid to or for the account of non-elected Union employees, and that the defendant trustees be enjoined from paying into or out of the Officers' Pension Plan fund further benefits to or for the account of non-officers.

The National Council of the Union convened immediately after the announcement of the District Court's decision and proposed amendments which would give the National Office of the NMU the authority to designate certain non-elected employees eligible under the Officers' Pension Plan—an authority the District Court had found the National Office did not have under the 1960 constitu-

tion—and "to validate retroactively all pensions heretofore paid under the plan."

The petitioners moved to re-argue. This motion was made returnable June 17, 1969, one day before the voting on the proposed constitutional amendments would end. The respondents moved the court (returnable the same date) to enjoin the individual defendants (1) from using counsel employed by the union on a retainer basis and (2) from attempting to circumvent the decision of the District Court by their proposal of amendments to the Constitution which were designed to exculpate them from their individual liability. On July 3, 1969, the District Court made orders denying both motions.

On July 18, 1969, the interlocutory judgment was entered. This judgment, (1) denied the petitioners' motion for summary judgment; (2) granted the respondents' cross-motion for summary judgment; (3) directed the petitioners to account to the NMU for all pension funds paid to the "Officers' Pension Fund" for the account of non-elected Union employees and for all pension funds paid to non-elected Union employees from the "Officers' Pension Fund"; (4) enjoined the petitioners from making further payments to non-elected employees from the "Officers' Pension Fund"; and (5) implicitly enjoined the petitioners from making further payments to the "Officers' Pension Fund" for the account of non-elected Union employees.

The respondents appealed under 28 U.S.C. 1292 from the order of July 3, 1969, which had denied their motion to enjoin the petitioners from using Union counsel in defending the action and to declare that the proposed constitutional amendments were exculpatory and void.

The petitioners appealed from the interlocutory judgment which had granted the respondents' motion for an accounting and injunction.

The United States Court of Appeals for the Second Circuit on March 31, 1970 affirmed the interlocutory judgment in all respects; reversed the order of July 3, 1969, which had denied respondents' motion to enjoin the use by petitioner of Union counsel and to declare that the proposed constitutional amendment was void, and remanded to the District Court for further consistent action.

Questions Presented

1. The primary question here involved really is: Are union officials permitted to select a favored few non-elected employees to participate in the plan approved by the union membership for officers' participation and designated in the union constitution as the "Officers' Pension Plan"?

2. The secondary question is: May union officers exculpate themselves from liability by promulgating retroactive amendments to the constitution which purport to relieve the officers of the union and the trustees of the officers' pension plan of a liability imposed on them by an order of the United States District Court?

3. Can a labor union with fifty some odd thousand members be guilty of laches so as to bar the recovery of squandered trust funds?

Respondents' Statement of the Case

All the relevant facts are recited in the opinion of Judge Anderson below (Appendix 15-26).*

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* Petitioners omitted Article 14, Section 7 of the 1960 Constitution and Article 15, Section 8 of the 1960 Constitution, in printing the "Relevant Provisions" of the Union Constitution in their Appendix (Appendix 44-45). These Articles are of foremost relevance and importance and appear in the Appendix as footnotes to Judge Anderson's comprehensive opinion (Appendix 16-18).

The 1951 Constitution empowered the National Council, subject to the membership approval, to provide pension benefits for both employees and officers (Joint Appendix 26a-43a; Exhibit A, p. 1). Pursuant to the terms of that Constitution separate pensions were set up for officers and employees (Joint Appendix 28a).

Both the NMU Constitution (Exhibit C, p. 43) and the Officers' Pension Plan (Exhibit A, p. 2) specifically enumerated the persons who were officers (Joint Appendix 51a). This plan for the benefit of the officers was approved by the union membership.

Thus it was clear that the membership of the union wished that solely elected officers participate in this lucrative plan. They knew who would be participants—only those elected by them. This was not a plan designed for friends of the National Council, or secretaries, or janitors. "Covered employment" was limited to elected "officers" (Exhibit A, p. 2).

In October, 1960, the NMU Constitution was amended by a vote of the membership. Old Article 15 was removed and a new Article 14 was substituted in its place. New Article 14 provided for an Officers' Pension Plan and limited authorized pensioners to "officers." Employees other than officers were not mentioned in the section which authorized pensions.

The NMU Constitution, in effect in 1961 when the non-elected employees were added by the defendants, contained no provision permitting inclusion in the Officers' Pension Plan of employees who were not elected officers (Exhibit D, p. 58; Joint Appendix 43a). The 1960 Constitution did not continue the authority to include non-officers in *this*, the *Officers'* Pension Plan, but expressly and deliberately terminated it.

The respondents do not dispute the fact that the National Office under Article 8, Section 11(b) (Exhibit D,

p. 34) had the power to bargain collectively, or to continue employees' pension plans which earlier had been properly enacted under the sanctions of the earlier 1951 Constitution, Article 15, Section 8 (Exhibit C, p. 61). As already indicated, there had been separate employee pension plans established for non-elected employees prior to 1960 (Joint Appendix 28a). Those employees' pension plans, in all probability, received the required membership approval and had the blessings of the union membership. In any event, they are not under attack here. The quesions raised by the respondents in the case at bar, deal solely with the wrongful inclusion of favored non-elected employees in this, the NMU Officers' Pension Plan.

The petitioners admit that the effect of the decision of the Circuit Court will require the repayment of "hundreds of thousands of dollars" to the union (Petition, pp. 4-5). In fact, the record shows that William Perry—a non-elected employee, received a lump sum of well over $100,000.00 (Joint Appendix 103a)* from the Officers Pension Plan. In addition, he is receiving a second pension under the NMU Deep Sea Pension Plan (Joint Appendix 77a). For reasons which are evident, the question has never been placed squarely before the union membership of whether or not they wished non-elected employees of the NMU to be eligible to receive *two pensions* of any sort by virtue of their union employment (Joint Appendix 84a). There are those, other than petitioner William Perry, who

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* Although it does not appear in the record, Mr. Perry's office as "Assistant to the President" was created by the NMU only shortly before the amendment to the NMU Officers' Pension Plan, which purported to include him under the said Officers' Pension Plan. No other amounts involved have been disclosed to the respondents. Mr. Perry, who was never a duly elected officer, received a total of $190,064.74 in the fiscal year ending June 30, 1969, according to the records of the Department of Labor. Of course, the major portion of this figure consists of pension funds wrongfully paid from the Officer's Pension Plan.

have received and, unless this writ is denied, will be eligible to receive two pensions (Joint Appendix 71a).

Regardless of what the word "salary" has been interpreted to mean in completely dissimilar cases, the 1960 Constitution in the case at bar *carefully distinguishes* between the terms "salaries" and "pensions" (Appendix 21, Joint Appendix 52a). The petitioners knew that the inclusion of these favored employes was not authorized. The best illustration of this is the alacrity with which they attempted to amend retroactively the 1960 Constitution to exculpate themselves from the individual liability imposed on them by the decision of the Court below.

No matter how the petitioners strive to explain their actions, their attempt to annul the District Courts' decision by seeking to amend retroactively the Constitution, was a strident admission that the District Court had decided the case correctly in the first instance. It has been more colorfully said: "The wicked flee when no man pursueth."

Reasons for Denying the Writ

I. There is no conflict between the Circuits.

The decision below does not conflict with *English* v. *Cunningham* (C.A.D.C.), 282 F. 2d 848. In both *English* and the case at bar, unjustified interpretations of Union Rules made by Union officials were reversed by the Courts. Both are authority for the proposition that a Union official must act within the limits of his authority. *English* does not hold that the Courts must accept all intramural interpretations. In fact, *English* is authority for just the opposite. Courts may test the reasonabless and fairness of the acts of union officials. That is what the Court did

in *English*. That is what the Court did here. (See also *Highway Truck Drivers and Helpers, Local 107* v. *Cohen*, 284 F. 2d 162, cert. denied, 365 U. S. 833, discussed *infra*, pp. 8-9).

II. The decision below is consistent with decisions in other circuits.

When District Judge Bonsal held that the defendants (petitioners) must account for monies paid to and from the Officers' Pension Fund, the defendants were faced with substantial personal obligations. In desperation, they quickly proposed amendments through which they sought to be relieved of the obligations imposed by the decision. The 1969 amendments purported to authorize retroactively the very same expenditures of union funds made by the defendants out of the Officers' Plan to non-elected employees, which the District Court had already found were improper. These retroactive amendments were exculpatory within the meaning of 29 USC 501, void as against public policy and invalid. Incidentally (though not here material), they were adopted by a majority vote of a relatively small minority of members.

In invalidating those amendments, the Second Circuit applied the teaching of the Cohen cases. *Highway Truck Drivers and Helpers, Local 107* v. *Cohen*, 182 F. Supp. 608 (1960), 284 F. 2d 162 (1960), cert. denied 365 U. S. 833 (1961), and *Highway Truck Drivers and Helpers, Local 107* v. *Cohen*, 215 F. Supp. 938 (1963) aff'd 334 F. 2d 378 (1964), cert. denied 379 U. S. 921 (1964). In the first *Cohen* case the officers were enjoined from using union funds to pay counsel employed to defend union officers. The union local had adopted a resolution which, on its face, permitted such payment. However, the Court held that this resolution contravened the constitution of the International Union and was void for that reason.

here the Court placed an interpretation upon the constiıtion which differed from the interpretation placed ıereon by the local. In overruling the resolution the ourt held (284 F. 2d at p. 164) that the power to do so as in "complete accord with the letter and spirit of the abor Management Reporting and Disclosure Act."

After the decision in the first *Cohen* case the Internaonal Union amended its constitution so as to authorize ıch use of Union funds. This action was exculpatory, and the second Cohen case it was held that the payment by ıe Union of counsel fees under such circumstances "was consistent with Section 501 of the Labor-Management eporting and Disclosure Act." At page 381 of volume 34 F. 2d McLaughlin C.J., said:

> "Appellants also urge that the 1961 amendment to the International Union's Constitution ratifying the resolution of the Local which approved the payments makes moot plaintiffs' action to set aside those expenditures as ultra vires. That abortive attempt to validate the illegal 1959 resolution, could not, of course, in 1961 legitimatize the 1959 payments which have been held to have been wrongful. And the action of the International was just as inconsistent with Section 501 of the Labor Management Act as was the Local's ill-conceived resolution." *Highway Truck Drivers, Local 107* v. *Cohen,* 334 F. 2d 378 (1964, Third Circuit).

This Court denied certiorari in both cases.

III. Some 50,000 seamen cannot be held guilty of ches with respect to the misuse or misapplication of ion funds entrusted to the officers.

This action involves union funds entrusted to the offirs. It was brought for the benefit of the Union member-

ship, *i.e.*, all the members of the NMU—not a handful of friends of those in control. The funds restored on the settlement of the account will swell the general funds of the Union. Under such circumstances, laches can play no part in a determination on the merits.

Conclusion

Petitioner's application does not satisfy the considerations governing review on certiorari, as guided by Rule 19 and the practice of this Court. Therefore it does not meet the jurisdictional requirements but merely pertains to the Court's interpretation of a Union constitution in an interlocutory judgment and the steps taken by the Union officials to attempt to circumvent that interpretation.

There are no conflicts between the Circuits on the points here involved. This Court has already denied certiorari in similar cases.

There are no issues justifying the attention of this Court. The petition should be denied.

Dated: New York, New York, June 15, 1970.

Respectfully submitted,

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